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In the Supreme Court of the United States

October Term, 1979
No. 79-739

RICHARD THORNBURGH, Governor of the Commonwealth of Pennsylvania, HELEN O'BANNON, Secretary of the Department of Public Welfare, and DON JOSE STOVALL, Executive Director, Philadelphia County Board of Assistance,

Petitioners

v.

PHILADELPHIA WELFARE RIGHTS ORGANIZATION et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No.

RICHARD THORNBURGH, Governor of the Commonwealth of Pennsylvania, HELEN O'BANNON, Secretary of the Department of Public Welfare, and DON JOSE STOVALL, Executive Director, Philadelphia County Board of Assistance,

Petitioners

v.

PHILADELPHIA WELFARE RIGHTS ORGANIZATION, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

Richard Thornburgh, Governor of Pennsylvania, Helen O'Bannon, Secretary of the Department of Public Welfare, and Don Jose Stovall, Executive Director of the Philadelphia County Board of Assistance, hereby petition that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 9, 1979.[1]

[1] The respondents to this petition are Philadelphia Welfare Rights Organization, a voluntary association by Louise Brookins,

OPINION BELOW

The opinion of the Court of Appeals is reported at 602 F.2d 1114 (1979). The opinion is also included in the Appendix at 32. The memoranda and orders of the District were not reported; however, they appear in the Appendix at 22.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 9, 1979. An extension of time in which to file a Petition for a Writ of Certiorari was granted to and including November 8, 1979, by Justice Brennan. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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trustee *ad litem;* Policy Advisory Committee of the Get Set Day Care Centers of Philadelphia by Nancy C. Bullett, Chairwoman; Nellie Rodriguez, individually and on behalf of her minor children, Alicia, Jose, Ramiro, Judy, Marilyn, Cynthia, and Eileen; Rowena Scott, individually and on behalf of her minor children, Melvin, David, Blair, Darlene, Lorraine, Yvonne, and Jermarie, and all others similarly situated.

QUESTIONS PRESENTED

1. Whether the Third Circuit Court of Appeals improperly extended the medicaid program, Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, to require participating states to fund the cost of orthodontic services where regulations of the Department of Health, Education and Welfare impose no such obligation.

2. Whether the Third Circuit improperly reversed the District Court's denial of respondents' preliminary injunction seeking orthodontic services when

   a. no party was shown to have a need for such services, thus lacking the standing required to establish a case or controversy, and

   b. Respondents' motion to hold petitioners in contempt for failure to perform orthodontic services under the terms of a consent decree that did not provide for such services was modified to be a preliminary injunction to require such services after the hearing on the consent decree was concluded.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Code, Title 42:

§1396d. Definitions—Medical Assistance

(a) The term "medical assistance" means payment of part or all of the cost of the following care and services. . .

(4) (B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary. . .

Federal Register, Volume 44, at 29424, to be codified in Code of Federal Regulations, Title 42, Part 441:

§441.56. Required Services

(a) *Screening.* The agency must provide for at least the following screening services:

(1) Health and developmental history.

(2) Unclothed physical examination.

(3) Effective January 1, 1981, development assessment.

(4) Immunizations which are appropriate for age and health history.

(5) Assessment of nutritional status.

(6) Vision testing.

(7) Hearing testing.

(8) Laboratory procedures appropriate for age and population groups.

(9) For children 3 years of age and over, dental services furnished by direct referral to a dentist for diagnosis and treatment.

(b) *Treatment.* In addition to any treatment services included in the plan, the agency must provide the following services, even if they are not included in the plan—

(1) Treatment for defects in vision and hearing, including eyeglasses and hearing aids; and

(2) Dental care needed for relief of pain and infections, restoration of teeth and maintenance of dental health.

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania provides an early and periodic screening, diagnosis and treatment (EPSDT) program for its citizens in accordance with Title XIX of the Social Security Act, 42 U.S.C.A. §1396d (a) (4) (B). This program is a preventive health service made available by participating states to individuals under 21 whose income, or whose families' income, renders them eligible under the state plan. Through EPSDT, children of poor families are screened for medical abnormalities by being given a physical examination and a battery of specified tests. Children are eligible to be screened under the program from infancy, according to a periodicity schedule. Most abnormalities discovered by the screen can be treated through the EPSDT program.

In 1973, Philadelphia Welfare Rights Organization together with other organizations and individuals, hereinafter referred to collectively as PWRO, initiated a class action against officials of the Commonwealth of Pennsylvania and the Department of Public Welfare, hereinafter referred to as the Commonwealth or the Department, concerning the EPSDT program. The action ultimately resulted in two consent decrees, one in 1974 and one in 1976, which provided a structure for the Department's implementation of the EPSDT program in Pennsylvania. In December of 1976, by means of a motion to modify in District Court, the Department sought relief from some provisions of the final consent decree specifying services

and time periods in absolute numerical terms. PWRO responded by filing three motions to hold the Commonwealth in contempt of court for failure to meet the terms of the consent decrees. One of these contempt motions, filed in 1977, was for failure of the Department to provide orthodontic services under the consent decree.

In recognition of the fact that the consent decree contained no provision requiring or implying that orthodontic services were to be made available, PWRO orally moved to modify its motion during oral argument at the conclusion of the hearing held on the consent decrees (T. 327). The motion was thus transformed from a motion to hold petitioners in contempt of a consent decree to a motion for a preliminary injunction. Due to these procedural informalities, the orthodontic issue was never heard separately, but was presented to the court at the hearing as if it were one of the questions relating to the consent decree. The witness who testified to the need for orthodontic services, and who was the subject of all the evidence relating to orthodontic services, was not even a named representative of the class.

Evidence adduced at the hearing on the consent decree demonstrated that the Commonwealth never provided orthodontic services under the EPSDT program (T. 281), and that Pennsylvania was found to have met federal requirements for EPSDT (T. 213). The official of the United States Department of Health, Education and Welfare, hereinafter HEW, having prime responsibility for implementing the EPSDT program throughout the nation, testified that states are not required by the EPSDT program to provide orthodontic treatment (T. 213). The orthodontic treatment available in Pennsylvania is pro-

vided by the Department of Health as a part of the crippled children's program[2] (T. 302).

On October 3, 1978, Judge Fullam of the United States District Court for the Eastern District of Pennsylvania entered a memorandum and order denying PWRO's application for injunctive relief seeking to require the provision of orthodontic services through the EPSDT program. That decision was appealed to the United States Court of Appeals for the Third Circuit which reversed the District Court and remanded the case for the entry of an injunction compelling the Commonwealth to provide orthodontic services to EPSDT recipients. This Petition for Writ of Certiorari seeks a determination by this Court of a state's obligation to provide orthodontic treatment to recipients of EPSDT.

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[2] Title V of the Social Security Act provides for maternal and child health care and crippled children and includes a separate section regarding dental services. 42 U.S.C.A. §701. The state plan for the crippled children program includes dento-facial, or orthodontic, services.

REASONS FOR GRANTING THE WRIT

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1. The decision of the Third Circuit conflicts with a decision of this Court and the interpretation of the federal agency charged with implementing the statute as to the breadth of benefits available under the Medicaid Statute.

In demanding that orthodontic services be included in the EPSDT program, PWRO is again raising the question of how far states and the federal government must go in providing every specific medically related service that can conceivably be included under the general terms of the Medicaid Statute. 42 U.S.C. §1396 *et seq.* HEW, the agency administering and enforcing the EPSDT statute, has never required the states to provide orthodontic care as a mandated service. Accordingly, the Commonwealth is unable to perceive how the statute can now be read to compel provision of such services.

The EPSDT program is required to be provided by states participating in the medicaid program and is described as follows:

> such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary. . . .

42 U.S.C. §1396d(a) (4) (B). It is clear from this section that the Secretary is charged with the obligation of developing an EPSDT program to conform to the general outline of the statute and is correspondingly free to impose such specific requirements through regulations as would fulfill the purpose of the statute.

The regulations adopted by the Secretary contain no reference to orthodontic services. They simply provide, under the screening component of the program, that "children three years of age and over, [be provided] dental services furnished by direct referral to a dentist for diagnosis and treatment." 44 Fed. Reg. 29424 (1979) (to be codified in 42 C.F.R. §441.56(a) (9)). In the treatment phase of the program, the regulations require provision of "dental care needed for relief of pain and infections, restoration of teeth and maintenance of dental health." 44 Fed. Reg. 29424 (1979) (to be codified in 42 C.F.R. §441.56(b) (2)).

That the statute and regulations do not specifically require the provision of orthodontic services is apparent on their faces. That such services are not implied under the general language of the statute and regulations is apparent from the federal agency's own interpretation of the law. This interpretation is clearly reflected in HEW's guidelines published in the Medical Assistance Manual, in its action in approving state plans which do not include orthodontic services, and in the testimony at the hearing in this case of the HEW official charged with the responsibility of program implementation for EPSDT.

The guidelines published in the Medical Assistance Manual, Section 5-70-20(G) (1), describe the minimal

dental care to be provided[3] and list the specific services included in three categories: emergency services, preventive services, and therapeutic services. None of these categories contains any reference to orthodontic services although such services as are included are listed with considerable specificity.[4] It can only be assumed, in light of the specificity of the services listed, that a program as distinct, expensive, and far-reaching as orthodontia would be included in this list of services if it was the intention of the agency or the statute to provide such services under the rubric of dental care.

The agency charged with the administration of a statute has the indisputable authority to establish legal limitations to the expanse of its coverage and to exclude services from its reach. *Beal v. Doe,* 432 U.S. 438 (1976). HEW has clearly excluded orthodontia from the coverage of the EPSDT program. It not only failed to

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[3] It is stated in the Manual:

> As a minimum, the dental services that must be provided include emergency services, preventive services and therapeutic services for dental disease which, if left untreated, may become acute dental problems or may cause irreversible damage to the teeth or supporting structures.

Medical Assistance Manual, Section 5-70-20(G)(1).

[4] Included under therapeutic services, the category which would logically contain reference to orthodontic treatment, are the following services:

1. Pulp therapy . . . .
2. Restoration of carious . . . teeth . . .
3. Scaling and curettage.
4. Maintenance of space for posterior primary teeth lost prematurely.
5. Provision of removable prosthesis . . . .

Medical Assistance Manual, Section 5-70-20(G)(1)(c).

list orthodontic services in its regulations or in its guidelines, but also it affirmatively approved Pennsylvania's state plan year after year when orthodontia was conspicuously absent from the plan. Furthermore, Mr. Chapin Wilson, Acting Branch Chief of the Program Implementation Branch in the office of Child Health of HEW, the office with responsibility for implementing the EPSDT program nationally, testified at the hearing that there is no requirement that states provide orthodontic treatment.[5]

This Court has recently reiterated, in connection with a case concerning the extent of coverage provided by the medicaid program, that "[W]e must be mindful that 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong'. New York Dept. of Soc. Services v. Dublino, 413 U.S. 405, 421 (1973), *quoting* Red Lion Broadcasting Co. v. FCC, 396 U.S. 367, 381 (1969)." *Beal v. Doe,* 432 U.S. 438, 447 (1976). Regardless of the intrinsic merit or beneficial nature of the program, the agency has the authority to exclude it from the coverage of the regulations and, having done so, is entitled to have its interpretation recognized.

This Court, interpreting the extent of Medicaid coverage under Title XIX, recently held that the statute does not require that state programs include every medical

[5] A. In terms of program requirements, I can say that the State of Pennsylvania's program would meet the intent of what the program regulations are saying.

Q. What is required in the federal regulations with regard to orthodontic treatment?

A. There isn't any requirement that states provide orthodontic treatment. (T. 213)

procedure related to the categories specified in the Act. *Beal v. Doe,* 432 U.S. 438 (1976). In that case, the medical procedure sought to be included, like orthodontia, was not referred to in the statute. The Court observed that "[i]nstead the statute is cast in terms that require participating States to provide financial assistance with respect to five broad categories of medical treatment . . . but nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care." *Id.* at 444.

As is the case with the medical procedure at issue in *Beal v. Doe,* HEW has taken the position that Title XIX permits—but does not mandate—funding for orthodontia.[6] HEW is the agency generally charged with the administration of this complicated statute and its Secretary is specifically authorized to develop an EPSDT program through regulations. Its decisions with respect to inclusion and exclusion of services in its regulations, and its undisputed interpretation of those regulations, are entitled to respect.

In concluding that orthodontic services must be included under the general provision for dental care, the Third Circuit made the erroneous assumption that any service "needed for relief of pain and infection, restoration of teeth, and maintenance of dental health",[7] must

[6] Both the federal regulations and the HEW Medical Assistance Manual include provisions which make it possible for a state to provide additional health services for the EPSDT group at its option. 44 Fed. Reg. 29424 (1979) (to be codified in 42 C.F.R. §441.57); Medical Assistance Manual, Section 5-70-20(G)(2).

[7] *PWRO v. Shapp,* 602 F.2d 1114, 1122 (3d. Cir. 1979).

be provided even though not specified in the statute, regulations, or guidelines of HEW. Applying this logic, any procedure which could impact on dental health, however remote, would be required under this section of the statute regardless of its specific inclusion or exclusion elsewhere in the law. For example, an abortion, specifically provided by Title XIX, could be required as a dental service according to the Third Circuit's logic if the chemistry changes in the body brought on by the condition of pregnancy were shown to have an adverse effect on the patient's dental health.

The Third Circuit's decision in this case requiring orthodontic services goes far beyond the requirements of the statute and regulations. In so doing it creates a dangerous precedent for extending the services government is required to provide under the Medicaid Statute. Whatever its good intentions in coercing an expanded governmental largesse, the Appellate Court's result not only goes beyond the requirements of the law but also encumbers the states and, to some extent, the individual recipients with severe burdens.

It can be anticipated that the program will cost every state, and the federal government as well, untold millions annually. Also, due to the difficulty recognized by the District Court of distinguishing between cosmetic and medically necessary treatment, extreme difficulties in administration can be foreseen. In addition, in view of the necessarily lengthy treatment involved in orthodontia, there is a substantial risk of frequent interruption in delivery of services to recipients. If a family becomes ineligible for EPSDT, it will suddenly be faced with supporting an extremely expensive orthodontic program for

all children receiving the service or discontinuing treatment. Furthermore, the problem of recipients' failure to keep treatment appointments, always high in EPSDT programs,[8] becomes even more serious when a child's teeth are fitted with braces which must be regularly serviced.

The reasons for HEW's decision to structure an EPSDT program which excludes orthodontia may include the concerns expressed above and may include additional reservations. In any event, that agency, and not the courts, is the arm of government with the authority and the expertise to establish the boundaries of the EPSDT program. For a court to assume control over decisions legislatively entrusted to an agency when no constitutional question is raised is improper and should be reversed.

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2. Federal court jurisdiction is lacking because none of the named plaintiffs has demonstrated the standing necessary to a case or controversy.

A consent decree represents as final a disposition of a case as any final court order. The content of the decree, therefore, cannot be arbitrarily revised to include or exclude matters later coming to the attention of the participants. "A consent decree represents an agreement by the parties which the court cannot expand or contract."

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[8] T. 219-222; exhibit D-25. Exhibit D-25 is a study by HEW comparing the "show for treatment" rate or rate of participation of eligibles in the treatment phase of EPSDT, in nine states including Pennsylvania.

Artvale, Inc. v. Rugby Fabrics Corp., 303 F.2d 283, 284 (2nd Cir. 1962). Similarly, an action on a consent decree cannot be used as a vehicle to introduce new causes of action simply because the plaintiff class has the defendants in court.

In an action on a consent decree, the decree itself defines the controversy. To inject a new issue, not covered in the consent decree, into the case is to expand the decree beyond its limits as expressly articulated by the parties and approved by the court, and to do so in disregard of the rules of standing and the constitutional limitation of federal court jurisdiction to actual cases or controversies.[9] U.S. Const. Art. III; *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976).

These fundamental principles were disregarded in this case. The plaintiff class was permitted to introduce its claim for orthodontic services as a contempt motion in connection with a consent decree which made no express or implied reference to such services. The need for orthodontic treatment was then testified to by a member of PWRO's class who was not named in the original complaint and was not a representative plaintiff. Subsequently, PWRO was permitted to modify its motion orally to seek a preliminary injunction totally unrelated to the consent decree.

By raising the orthodontia issue in a contempt motion and then modifying it to a motion for a preliminary injunction, PWRO sought to benefit from its previously

[9] Standing may be determined for the first time on appeal. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

certified class and avoid the need to demonstrate an independent case or controversy. The result of these procedural irregularities is that none of the named, representative class members has demonstrated his or her standing by showing a need for orthodontic treatment. The only witness showing such a need is not a representative of the class. The requisite personal stake in the outcome of the procedures on the part of the representative plaintiffs is therefore lacking and the federal courts are similarly without jurisdiction to hear the claims. As this court has stated and reiterated:

> Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.

O'Shea v. Littleton, 414 U.S. 488, 495 (1974); *accord, Sosna v. Iowa*, 419 U.S. 393 (1975); *Boyle v. Madigan*, 492 F.2d 1180 (9th Cir. 1974).

PWRO has achieved a ruling requiring the extention of Medicaid benefits to include provision of a highly complex and expensive program, orthodontia, to all EPSDT recipients on the basis of a record which reveals not a single named plaintiff to be in need of such services. The issue was injected into an action involving a consent decree which made no reference to orthodontia and the procedural device of a class action was utilized to bootstrap PWRO into a case or controversy that it was unable to demonstrate independently. As a consequence of PWRO's lack of standing to maintain this action, the Third Circuit's decision should be reversed.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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October 29, 1979

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action
No. 73-290

PHILADELPHIA WELFARE RIGHTS ORGANIZATION, et al.,
Plaintiffs,

v.

THE HONORABLE MILTON J. SHAPP, et al.,
Defendants.

PLAINTIFFS' MOTION TO HOLD DEFENDANTS IN CONTEMPT OF COURT FOR FAILURE TO PROVIDE ORTHODONTIC SERVICES TO ELIGIBLE CHILDREN UNDER THE AGE OF 21 YEARS.

Plaintiffs, by their counsel, hereby move this Honorable Court to hold the defendants in the above-named action in contempt of court and aver the following facts in support:

1. On September 7, 1973, this Court issued an Order in the above-captioned case.

2. On March 15, 1974, the parties signed a Consent Decree which was ordered and approved as additional and supplementary relief to the original Order.

3. On January 19, 1976, the parties signed an additional Consent Decree which the Court ordered and approved on March 15, 1976.

4. The defendants have violated the following provisions of the above orders in that they do not provide orthodontic services which are determined medically necessary and thus violate:

a. The September 7, 1973 Order ¶3 which enjoined the defendants from depriving eligible persons from treatment under 42 U.S.C. §1396d(a) (4) (B). 45 C.F.R. §§249.10(a) (3) and (b) (4) (ii) and federal guidelines MAM 5-70-20(A) (3) and (G) (1) and the September 7, 1973 Order, ¶¶4a and b which ordered the defendants to issue regulations "to allow payments to be made for *all* needed treatment including eye care, *dental care,* and drugs." [Emphasis added.]

b. The March 15, 1974 Order ¶¶2b and c which restated ¶¶4a and b of the September 7, 1973 Order.

c. The January 19, 1976 Consent Decree and March 15, 1976 Order which continued the earlier Orders.

5. The defendants have wilfully and wantonly denied members of the class medically needed orthodontic services, including the child of Arlene Millard. The exact number of eligible children who have been denied such treatment is unknown to the plaintiffs, but is within the knowledge and records of the defendants.

6. Eligible children who have been medically determined to need orthodontic services for non-cosmetic reasons have suffered and continue to suffer permanent dental damage, as well as nutritional and psychological injuries.

For the above stated reasons, the plaintiffs respectfully request that the defendants be held in contempt of court.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action
No. 73-290

PHILADELPHIA WELFARE RIGHTS ORGANIZATION, et al.,
Plaintiffs

v.

THE HONORABLE MILTON J. SHAPP, et al.,
Defendants

MEMORANDUM AND ORDER

FULLAM, J. July 18, 1978

After considering the supplemental memoranda filed by the parties following the hearing of March 29, 1978, I have concluded that the form of Order submitted by the defendants is appropriate, and have therefore entered that Order.

Filed
Jul 19 1978
John J. Harding, Clerk

By ———— Dep. Clerk

Entered: 7/19/78
Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-290

PHILADELPHIA WELFARE RIGHTS ORGANIZATION, et al.,
Plaintiffs

v.

THE HONORABLE MILTON J. SHAPP, et al.,
Defendants

ORDER

AND NOW, to wit this 18th day of July, 1978, upon consideration of Defendants' Motion to Vacate and/or Modify the Consent Decree in this matter, IT IS ORDERED THAT:

1. The Consent Decree of January 19, 1976 be, and hereby is, vacated.

2. The Consent Decree of March 15, 1974 be, and hereby is, declared null and void.

3. This Order shall and hereby does supersede paragraph four (4) of this Court's order of September 7, 1973, but all other findings and judgments ordered by this Court shall remain in full force and effect.

4. Defendants shall continue to implement a program of early and periodic screening, diagnosis and treatment for children under twenty-one years of age who are eligible for screening benefits under the current Pennsylvania State Medical Assistance Plan in accordance with the September 7, 1973 order of this Court, and as specifically set forth herein.

5. The Defendants shall institute and/or update as appropriate, administrative procedures and policies to comply with those provisions, among others, set forth in this Order. Defendants shall not reduce the current quality of the screening as defined in Pennsylvania Medical Assistance Manual (MA Manual Section 9428 *et seq.*). It is further Ordered that the quality and scope of the treatment provided for screening-detected abnormalities under the Pennsylvania EPSDT Program shall be in accordance with federal regulations and shall equal or exceed the quality of the medical assistance defined in Pa-DPW Man. §9100 *et seq.*

6. The Defendants shall assign staff, qualified by training and in sufficient numbers, in each county specifically to the EPSDT program. Such personnel shall participate in orientation sessions designed to create and encourage greater familiarity with the EPSDT program. These orientation sessions shall be provided to all appropriate staff in each county or district office. In particular, training sessions will attempt to foster attitudes and procedures that will be used by the EPSDT staff to address and reduce the present no show problem.

7. The outreach effort performed in each county shall encompass a variety of procedures in order to provide each individual recipient with the most appropriate

information to encourage participation of that individual in the EPSDT program. Such outreach efforts shall routinely include personal face-to-face contact, telephone contact and written notification to all eligible families during the first quarter of their eligibility in the medical assistance program and thereafter on an annual basis or in accordance with the periodicity schedule of the screened child within the EPSDT program. The county assistance offices will be supplied with handbills and registration cards in order to routinely inform eligible families of the benefits of the EPSDT program at all intake and eligibility determination interviews. Information related to the EPSDT program will be incorporated into all appropriate interviews for eligibility determination and/or home visits by welfare workers. The Defendants will develop and distribute EPSDT manuals to all caseworkers and intake workers outlining the most appropriate outreach procedures. The Defendants will develop manuals and provide the orientation sessions. The Defendants will include in its ongoing training program for CBA personnel those procedures and policies pertaining to the EPSDT program. Eligible recipients will be informed of the availability of transportation reimbursement under existing departmental regulations.

8. The Defendants shall in every county arrange for appointments for desired screening and for the needed diagnosis and treatment services which the screening detects. The date of the screening appointment shall be within forty-five (45) days from the date the recipient indicates a desire to be screened unless the recipient desires a specific provider who has no available appointments within the forty-five (45) days, or unless reason for a greater length of time is documented in the recipient's

case record. Transportation costs of all EPSDT recipients for screening shall be paid by the Department in accordance with Pennsylvania DPW Manual Section 9415 *et seq.* (as revised and effective April 1, 1975). [See Medical Assistance Memorandum 6, Supp. 15.1] Necessary medical care for purposes of Manual Section 9415 shall be considered to include EPSDT screening.

9. The Defendants shall arrange an appointment for diagnosis and treatment for all medical abnormalities (currently covered by the Pennsylvania Medical Assistance Program) detected as a result of screening within sixty (60) days from the date of the screening, unless good reason for a greater length of time is documented in the recipient's case record. If such diagnosis and treatment will be unavailable (within the above noted sixty (60) days) within the county where the recipient resides, the Department shall notify the recipient where the nearest appropriate medical facilities are located and arrange for treatment at such facility within sixty (60) days from the date of the screening. The EPSDT recipient shall also be notified that the Department will pay the cost of the child's and guardian's transportation, for the purpose of diagnosis and treatment, to the nearest appropriate facility where the recipient can receive diagnosis and treatment within the sixty day period. [See Medical Assistance Memorandum 6, Supp. 15.1] Eligible recipients for whom screening and diagnosis and treatment appointments have been made shall be reminded shortly before their scheduled appointment.

10. The Defendants, in order to increase the availabiltiy of screening and treatment services, will continue the enrollment program designed to attract medical providers to the EPSDT program. The Defendants will continue individual interview campaigns with medical providers throughout the Commonwealth in order to solicit the participation of more providers in the EPSDT program. The ongoing goal of the Department's enrollment program will be to establish a provider system in each county that is capable of meeting each county's screening and treatment needs. In any county where the number of screening providers is inadequate, screening will be provided in nearby counties.

11. The Department shall continue to cooperate with the Department of Health in order to incorporate Pennsylvania Health Department clinics into the EPSDT program.

12. Defendants shall work with the Department of Health to encourage every appropriate hospital, health clinic and appropriate medical organization to participate in the EPSDT program throughout the Commonwealth.

13. A performance quota in terms of number of screens shall be set for each county to reflect that county's share of state-wide screening goals set by Defendants for each calendar year.

14. Each quarter the Department shall issue a report indicating the ability of the counties to meet the proposed desired level of performance and problems being experienced. Such reports shall include: 1. the number of eligible children; 2. the number of appointments for screening during each month of the quarter; 3. the number of children actually screened during each month of the quarter; 4. the number of children who were actually screened who need referrals for diagnosis and treatment;

5. the number of children for whom diagnosis and treatment appointments were made during each month of the quarter; 6. the number of children during each month of the quarter, who kept their diagnosis and treatment appointment; and 7. the number of children who required diagnosis and treatment with appointments outstanding within 30, 60, and 90 days (respectively) from the date of the screening appointment.

15. Plaintiffs, by and through their attorneys, shall be notified and allowed to attend any and all meetings of the Defendants' Medical Technical Advisory Committee to the Early Screening Program.

16. This Order shall be observed and obeyed by the defendants, their successors in office, agents and employees throughout the Commonwealth of Pennsylvania.

By the Court,
(s) John P. Fullam
Honorable John P. Fullam *J.*

Entered 7/19/78
Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action
No. 73-290

PHILADELPHIA WELFARE RIGHTS ORGANIZATION, et al.,
Plaintiffs

v.

THE HONORABLE MILTON J. SHAPP, et al.,
Defendants

MEMORANDUM AND ORDER

FULLAM, J. October 3, 1978

Plaintiffs have filed a Motion for Clarification of this Court's Order of July 18, 1978, asserting that there is confusion as to whether that Order ruled upon plaintiffs' request for a preliminary injunction requiring the defendants to provide orthodontic services.

At the conclusion of the hearing in this matter, the Court ruled from the Bench as to all issues except orthodontic services. The parties were invited to submit additional briefs on that issue. Both sides complied, and submitted their respective proposed forms of order. The Court agreed that the defendants' position was correct, and therefore filed a Memorandum so stating, and entered the defendants' form of order. In these circumstances, the

alleged confusion on the part of plaintiffs' counsel is itself confusing. But because of certain informalities surrounding the oral conversion of plaintiffs' original motion to hold the defendants in contempt for violating an earlier Consent Order, into a motion to amend the Consent Order by providing additional injunctive relief relating to orthodontic services, I agree that it would be tidier to enter an order expressly denying plaintiffs' application for injunctive relief in that respect.

The reasons for this decision may be briefly stated. The issue is not whether provision of orthodontic services under this program would be desirable, but whether Pennsylvania's failure to include such services in its program is inconsistent with federal statutory law or federal regulation. Both Pennsylvania and the federal representatives interpret the applicable federal statute and regulations as not requiring orthodontic services. This interpretation seems to me quite correct; moreover, great deference is to be accorded to the federal administrative interpretations in this context.

I believe everyone would agree that there was never any intention to fund programs of cosmetic orthodontia. Granted there may be cases in which orthodontic work should be performed in aid of the physical health and well-being of a particular child, *i.e.*, in very extreme cases, it is nevertheless permissible to exclude orthodonture entirely from this particular program, in view of the administrative difficulties that would be encountered in attempting to draw a line between cosmetic and therapeutic services. It is simply not within the province of a court to tell Congress, the Executive Branch, or the State government what services must be provided.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action
No. 73-290

PHILADELPHIA WELFARE RIGHTS ORGANIZATION, et al.,

Plaintiffs

v.

THE HONORABLE MILTON J. SHAPP, et al.,

Defendants

ORDER

AND, NOW, this 3rd day of October, 1978, upon consideration of plaintiffs' Motion for Clarification, it is ORDERED that, to the extent that plaintiffs herein have sought injunctive relief requiring the defendants to provide orthodontic services, plaintiffs' application for injunctive relief is DENIED.

(s) John P. Fullam
J.

Entered: Filed Oct. 4, 1978
Clerk of Court

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 78-2221 and 78-2353

PHILADELPHIA WELFARE RIGHTS ORGANIZATION, a voluntary association by LOUISE BROOKINS, trustee *ad litem;* POLICY ADVISORY COMMITTEE of the GET SET DAY CARE CENTERS of Philadelphia by NANCY C. BULLETT, Chairwoman; NELLIE RODRIGUEZ, individually and on behalf of her minor children, Alicia, Jose, Ramiro, Judy, Marilyn, Cynthia, Eileen; ROWENA SCOTT, individually and on behalf of her minor children, Melvin, David, Blair, Darlene, Lorraine, Yvonne, and Jermarie, on behalf of themselves and all others similarly situated,

Appellants,

v.

The Honorable MILTON J. SHAPP, Governor of the Commonwealth of Pennsylvania, HELENE WOHLGEMUTH, Secretary of the Department of Public Welfare of Pennsylvania, and DON JOSE STOVALL, Executive Director, Philadelphia County Board of Assistance, individually and in their official capacity
(D.C. Civil No. 73-0290)

On Appeal From the United States District Court for the Eastern District of Pennsylvania

Argued April 30, 1979
Before Adams, Gibbons and Weis, *Circuit Judges*
(Opinion filed July 9, 1979)

Stephen F. Gold, Esquire (Argued), Community Legal Services, Inc., Sylvania House, Juniper and Locust Streets, Philadelphia, Pennsylvania 19107, Attorney for Appellants

Margaret Hunting, Esquire (Argued), Amy Zapp, Esquire, Deputy Attorneys General, Edward G. Biester, Jr., Acting Attorney General, Pennsylvania Department of Justice, Capitol Annex Building, Harrisburg, Pennsylvania 17120, Attorneys for Appellees

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OPINION OF THE COURT

Gibbons, *Circuit Judge:*

The plaintiffs, class representatives, appeal (1) from an order granting defendants' motion to modify a consent final injunction, and (2) from an order denying their motion for additional preliminary injunctive relief supplementing that granted in the consent final injunction. The complaint sought enforcement of those sections of Title XIX of the Social Security Act which require states participating in the federal Medicaid program to provide early and periodic screening, diagnosis and treatment (EPSDT) to eligible individuals under the age of 21. 42 U.S.C. §1396d(a) (4) (b). The plaintiffs are the Phila-

delphia Welfare Rights Organization, a voluntary association of welfare recipients, Policy Advisory Committee, an association of parents of children receiving day care services, and several individual parents receiving public assistance, whose children are eligible for EPSDT services. The defendants are the Governor and the Secretary of the Department of Welfare of Pennsylvania, and the Executive Director of the Philadelphia County Board of Assistance. These public officials are responsible for Pennsylvania's compliance with federal Medicaid statutes and regulations. The consent decree which was modified was entered on March 15, 1976. We affirm the order modifying it. The motion for a preliminary injunction granting supplementary relief was made on March 28, 1978 and denied on October 3, 1978. We reverse that order and remand for further proceedings.

I

Facts and Proceedings in the District Court

a) *The EPSDT Program*

Under Title XIX of the Social Security Act federal funds are made available to the states to cover the major part of the cost of medical assistance for the poor. As a condition of participation, the statute requires each state to make EPSDT services available to children of eligible poor families. Under the EPSDT program, children are screened for medical abnormalities by physical examinations and a battery of specified medical tests. Most problems discovered by screening are then treated under the EPSDT program, either by the examining physician or by other participating doctors. Children are eligible for screening under the EPSDT program from infancy, on a

periodic schedule of one screen every three months up to the age of a year and a half, and thereafter once a year until age 21.

Regulations of the United States Department of Health, Education and Welfare (HEW) promulgated under 42 U.S.C. §1396d (a) (4) (B) require that participating states establish an administrative mechanism to identify available screening and diagnostic facilities and to assure that eligible children receive EPSDT services. These regulations have two aspects: outreach, which involves the identification and recruitment of patients, 42 C.F.R. §444.-55 (1978), and administration, which involves the delivery of services. 42 C.F.R. §441.54 (1978). In Pennsylvania the ESPDT program is administered by the Department of Public Welfare. In most localities the Department operates its outreach program through County Boards of Assistance. The Boards are responsible for notifying eligible persons of the existence and nature of the program, for arranging screening appointments if they are desired, and for assisting with transportation. In the Philadelphia and Pittsburgh metropolitan areas the County Boards are responsible only for informing new welfare recipients of their eligibility for ESPDT services. The task of actively seeking out clients, informing them of the available services, and arranging screening appointments is performed by two contractors, Philadelphia Health Management, and Health Screening Corporation. These contractors run an extensive outreach program. The State Department and the contractors also share responsibility for the recruitment and payment of physicians for the program. For in Pennsylvania, unlike many other states, both screening examinations and treatment are performed predominantly by private physicians.

b) *Early History of the Litigation*

The plaintiffs' complaint was filed on February 13, 1973. Its central allegation was that although Pennsylvania was a Medicaid participant it had not complied with the provisions of Title XIX requiring an EPSDT program. The defendants defaulted, and on September 7, 1973 the district court entered a default judgment. That judgment set forth an injunction directing the defendants to refrain from depriving eligible persons of the screening, diagnosis and treatment required by 42 U.S.C. §1396d and required the defendants within 30 days (a) to promulgate regulations extending EPSDT coverage to all eligible persons, and (b) to implement a statewide outreach program. The defendants were required to establish, within 60 days, a full statewide program for all eligible children. They were also directed to request appropriations from the Pennsylvania legislature adequate to implement the required EPSDT program.

In December, 1973, the plaintiffs obtained an order directing the defendants to show cause why supplementary relief should not be granted. Negotiations followed, and in early 1974, the parties entered into an agreement providing for supplementary relief. This agreement was approved and adopted by the court as a consent final judgment on March 15, 1974 (the 1974 decree). The decree established a structure for the implementation of an EPSDT Program. It contained an express waiver of Pennsylvania's Eleventh Amendment or Pennsylvania law immunity. The defendants agreed to keep records of all EPSDT screens for two years. At the end of that period, for each eligible recipient for whom the Commonwealth could not show a health screening profile, a voluntary release, or evidence of an appointment for screening within 30 days, it would pay 133% of the cost of a "full screening visit" under the program. This penalty payment provision was designed to provide an incentive for implementation of an effective outreach program.

In late 1975 the plaintiffs, dissatisfied with the defendants' performance under the 1974 consent decree, moved to hold them in contempt. Before that motion was adjudicated the parties entered into a new agreement. The plaintiffs agreed to a postponement of the payment provisions of the 1974 decree, on condition that the defendants perform 180,000 EPSDT screens during the 1976 calendar year. In the event that the defendants met this goal during 1976 the entire 1974 decree would become void. If not, the payment provisions would remain in effect. The Commonwealth undertook to perform 210,000 screens in 1977, to provide screening appointments within 45 days of a request, and to schedule treatment for medical conditions discovered within 60 days of the screening. The Commonwealth also undertook to make other specific improvements in the Pennsylvania EPSDT program. The district court incorporated the new consent agreement as an order of the court on March 15, 1976 (the 1976 decree). Thus under the 1976 decree the defendants were obliged to achieve 180,000 screens by December 31, 1976 or incur liability for the payments provided for in the 1974 decree.

c) *The 1976-1978 motions*

With the December 31, 1976 deadline approaching, the Commonwealth defendants moved, pursuant to Fed. R. Civ. P. 60(b), to vacate or modify the 1976 consent decree. The motion acknowledged that the goal of 180,-

000 screens in 1976 would not be met, and suggested that the 210,000 screen goal for 1977 might also be unreachable. The defendants contended that they had attempted good faith compliance, but fell short because of the refusal of EPSDT services by many eligible recipients, the failure of many eligible recipients to show up for scheduled appointments, and a shortfall of participating physicians and dentists. The motion sought, alternatively, complete relief from the decree, or its modification so as to eliminate those provisions with which the defendants were unable to comply. While the defendants' Rule 60(b) motion was pending the plaintiffs filed cross-motions (1) to hold the defendants in contempt for failing to perform 180,000 screens in 1976 and for failing to provide diagnosis and treatment of discovered medical abnormalities within 60 days of screening; and (2) to enforce the payment provisions of the March 15, 1974 decree. A motion filed on March 18, 1977, sought to hold the defendants in contempt for failure to provide any orthodontic services.[1] On March 7, 1978, prior to the hearing on the foregoing motions, the plaintiffs filed a third motion to hold defendants in contempt for failing to meet the goal of 210,000 screens in 1977, for continuing failure to provide treatment within 60 days of screening, and for failing to issue certain monthly reports required by the 1976 decree. This motion also sought to enforce the payment provisions of the 1974 decree for eligible persons not screened in 1977.

d) *The Hearing and the District Court Rulings*

A hearing on the several motions was held by the district court on March 28 and 29, 1978. The uncon-

[1] This motion was later orally modified to a motion for a preliminary injunction.

tradicted evidence presented at the hearing showed that screens performed under the Pennsylvania EPSDT program had increased from 115,000 in calendar 1975 to 176,000 in calendar 1976, an increase of over 50%. Simultaneously, the "no show" rate for screening appointments had decreased from 50% to between 35% and 45%. The evidence also showed that Pennsylvania performed the highest number of screens in absolute terms of any state in the nation, and ranked eighth in terms of the percentage of eligible persons screened, ahead of all states of comparable size except for Texas. James McKittrick, the Welfare Department official in charge of the EPSDT program, testified, again without contradiction, that the Pennsylvania EPSDT program was among the 5 or 6 best programs in the country. Chapin Wilson, the HEW official responsible for EPSDT oversight, testified that Pennsylvania's outreach program was superior, and that the state's extensive provider recruitment program was "unique" and impressive.

With regard to provision of follow-up services, while the defendants conceded that not all children were treated within 60 days of their screening, a nine state survey of "shows for treatment" (i.e., the percentage of screened persons who later were successfully referred for further treatment) showed that Pennsylvania treated the highest percentage of problems identified through EPSDT screening of any state surveyed, and that this superiority was evident in every treatment category including dental services.

These results followed a substantial commitment of resources. The defendants' evidence showed a doubling of expenditures in Allegheny County, and a substantial increase in funding in the Philadelphia area. EPSDT was

one of the few programs which was the subject of a special Bulletin from the Secretary of the Department of Welfare, and the only Medicaid sub-program with a full time program administrator for statewide operations.

To explain the failure to meet the 180,000 screen standard, the defendants introduced evidence that the total population eligible for EPSDT screening in 1976 was between 230,000 and 250,000 persons, a figure which, due to declining welfare rolls, was significantly lower than had been expected at the time of the consent decree. Given that figure, they argued, and the 35-45% no show rate, achievement of the screening goals was virtually impossible. Substantial testimony was also presented indicating that the Department of Welfare's screening program had been badly set back by unanticipated difficulties in obtaining the cooperation and assistance of the Pennsylvania Department of Health.

At the close of the hearing on March 29, 1978 the district court ruled from the bench on all motions except that directed to providing orthodontic services. On each of the other motions he ruled in favor of the defendants, at least in part. The court refused to hold the defendants in contempt, finding that although they had not complied with the 1976 decree, to the extent it lay within their power they had attempted in good faith to do so. The Rule 60(b) motion was granted, and a modified decree entered. The modified decree eliminated the numerical requirements of the two earlier decrees, the related payment provisions, and the absolute 60 day time limit for treatment, but in other respects continued in effect provisions substantially identical with those embodied in the 1976 order. The effect of the modification was a refusal to enforce the payment provisions of the 1974 and 1976

decrees. An order reflecting these rulings was entered on July 18, 1978.

On the orthodontia motion the court reserved decision, and requested supplemental briefing. Treating that motion as an application for additional injunctive relief, the court on October 3, 1978 denied it, on the ground that Title XIX and the governing HEW regulations do not require the provision of orthodontic services. These appeals from the July 18, 1978 and October 3, 1978 orders followed. The appeal from the July 18, 1978 orders puts in issue only the grant of Rule 60(b) relief, not the court's denial of the contempt motions. The appeal from the October 3, 1978 order puts in issue the propriety of the court's legal conclusion that orthodontic services are not required by federal law.[2]

II

The Rule 60(b) Determination

The plaintiffs contend that the district court erred in modifying the 1976 decree because the defendants failed

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[2] The complaint asserts jurisdiction under 28 U.S.C. §1331 and alleges that the amount in controversy exceeds $10,000. That allegation was never put in issue, and the consent judgment of March 15, 1974 must be deemed to have adjudicated the court's subject matter jurisdiction since the time for direct appeal from that judgment has already run. *See, e.g.,* Dowell v. Applegate, 152 U.S. 327 (1894); Des Moines Navig. & R. Co. v. Iowa Homestead Co., 123 U.S. 552 (1887); McCormick v. Sullivan, 23 U.S. (10 Wheat.) 192 (U.S. 1825). *Cf.* Durfee v. Duke, 375 U.S. 106 (1963). The defendants have not contested subject matter jurisdiction under §1331 in their Rule 60(b) motion or on appeal. We have no occasion, therefore, to consider the alternative allegation of jurisdiction under 28 U.S.C. §1343(3). *Cf. Chapman v. Houston Welfare Rights Org.,* 47 U.S.L.W. 4529 (U.S. May 14, 1979).

to establish grounds for relief from a judgment. As noted above, the 1976 decree was modified in only three respects. First, the strict numerical quotas for annual EPSDT screens, applicable for the years 1976 and 1977, were eliminated. Second, the related provision for payment of 133% of the cost of such screens to eligible but unscreened persons fell with the elimination of the quotas. Third, the defendants' duty to provide treatment for discovered abnormalities within 60 days of the EPSDT examination in which they were discovered was qualified.[3] A broad and detailed injunction mandating the continued operation of the Pennsylvania EPSDT program in compliance with federal law remains in effect. Moreover paragraph 13 of that injunction requires that the defendants set for each county its share of an annual state-wide screening goal.

Although the district court did not say so specifically, we conclude that the modification was made pursuant to Rule 60(b)(5), which provides for relief from judgment when "it is no longer equitable that the judgment should have prospective application." We have observed that the standard for reopening a consent final judgment is a strict one. The Rule confers on district judges "no standardless residual discretionary power to set aside judgments. . . ." *Mayberry v. Maroney,* 558 F.2d 1159, 1163 (3d Cir. 1977). Such relief is extraordinary and may be granted only upon a showing of exceptional circumstances. *Id.* We recognize, as well, that while consent decrees are

[3] Under the 1976 decree the defendants' duty to provide treatment within 60 days was absolute. The new decree permits relief from the 60 days obligation where "good reason for a greater length of time is documented in the recipient's case record."

judicial acts, they have often been recognized as having many of the attributes of a contract voluntarily undertaken. *See United States v. ITT Continental Baking Co.,* 420 U.S. 223, 236 (1975); *United States v. Armour Co.,* 402 U.S. 673, 681 (1971). And where, as here, the defendants made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment their burden under Rule 60(b) is perhaps even more formidable than had they litigated and lost. Nevertheless it is undisputed that the court has the power to modify a decree when the danger which the decree sought to prevent has been "attentuated to a shadow" or the decree if unmodified could become for the future "an instrument of wrong." *United States v. Swift & Co.,* 286 U.S. 106, 115, 119 (1932).

We note, first, that the decree continues in force most of the provisions designed to enforce the Commonwealth's obligation to comply with 42 U.S.C. §1396d(a)(4)(b), provisions which have produced one of the most successful EPSDT programs in the country. The modifications in question thus do not leave class members open to the evils to which the lawsuit was first addressed. This fact distinguishes this case from those relied on by the appellants. In *United States v. Swift & Co., supra,* for example, the proposed modification would have restored to the wholesale food marketplace the "ancient peril" of domination by the large meatpackers which the government suit had sought to eliminate. Similarly, in *Mayberry v. Maroney, supra,* the application sought to obtain leave to reopen the Behavior Adjustment Unit, closure of which had been the central object of the lawsuit. Nor have the defendant state officials been authorized by the modification of the decree to disregard entirely their obligations to the plaintiff class,

as they attempted to do in *Vecchione v. Wohlgemuth, supra.* The question thus is whether the court erred in modifying the decree while preserving its essential features.

Second, all of the cited cases concerned relatively simple prohibitory injunctions. Here, however, we deal with the elimination of strict performance requirements of a complex ongoing remedial decree, and with financial incentives designed to encourage the achievement of those requirements. The district court found that despite good faith efforts those mandatory requirements—both the screening goals and the treatment within 60 days rule—proved impossible of performance. As our review of the evidence makes clear, those findings are fully supported by the record. Any injunction imposing mandatory affirmative duties for the future involves elements of prediction. Whether the prediction as to achievability is made as a result of litigation or, as here, in a negotiated settlement, it will always be speculative to some degree. This is particularly the case when the defendants' ability to achieve compliance depends upon the receptivity of class members or other third parties not formally before the court. *See* Special Project, *The Remedial Process in Institutional Reform Litigation,* 78 Col. L. Rev. 784, 818-19 (1978). An approach to the modification of a complex affirmative injunction which over-emphasized the interest of finality at the expense of achievability would inevitably make defendants wary of any decree imposing more than the bare minimum of affirmative obligation. That wariness would, we think, tend to discourage the settlement of injunction actions by consent decree, a high price to pay for the benefits of finality. Even where the decree is litigated, if the power to modify were too closely curtailed the defendants

might seek, and the courts might tend to impose, minimum affirmative obligations, perhaps less than realistically achievable, for fear of becoming bound by unreasonable but unchangeable requirements. Where an affirmative obligation is imposed by court order on the assumption that it is realistically achievable, the court finds that the defendants have made a good faith effort to achieve the object by the contemplated means, and the object nevertheless has not been fully achieved, clearly a court of equity has power to modify the injunction in the light of experience. That is what occurred here. Despite a good faith effort at compliance, circumstances largely beyond the defendants' control and not contemplated by the court or the parties in 1976 put achievement of the screening goals and treatment timetable beyond reach. The district court did not err in modifying both.

The payment provision was included not to provide a windfall to unidentified class members, but to provide a financial incentive for the achievement of outreach goals which, although diligently pursued, proved in practice to be unattainable. Many of those who were not screened in 1976 and thus might have received the incentive payments may have been screened and even treated since. Payment to them now, when the screening goals are no longer included in the decree, would be no incentive for anything, but merely a punitive exercise. Were the payment provision to be enforced the decree would become "an instrument of wrong." *United States v. Swift & Co., supra,* 286 U.S. at 115. Thus the court did not err in eliminating the payment provision as well.

Thus we conclude that the order of July 18, 1978 modifying the 1978 decree should be affirmed.

III

The Orthodontia Issue

The district court held that defendants' conceded failure to provide medically necessary, as distinguished from cosmetic, orthodontic dental care to eligible children as a part of its EPSDT program was not inconsistent with Title XIX of the Social Security Act or with the implementing HEW regulations. The possible consequences of the Commonwealth's omission of medically necessary orthodontic care are demonstrated on the present record by the case of Laurene Jerico, the eleven year old daughter of Arlene Millard, a plaintiff class representative. A report from Dr. James A. Bond, D.D.S., Chairman, Department of Orthodontics, Temple University School of Dentistry, indicated that Laurene had a medical need for orthodontic treatment. According to Doctor Bond:

> The abnormal eruption of the maxillary right cuspid has contributed to a history of trauma to the cheek mucosa in that location. Moreover, since the root of this tooth has been forced outward (toward the cheek), by the crowding condition, the over-lying tissues have been stretched beyond normal limits which could lead to eventual recession of these tissues. Treatment will require orthodontic appliances of both arches and extraction of teeth to provide arch length for tooth alignment.

At the Pennsylvania Department of Public Welfare's hearing on the issue of Laurene's need for orthodontic services, an impartial hearing examiner denied Laurene medical assistance for orthodontia because it was not a part of the defendants' medical assistance program. The hearing examiner found that the "treatment prescribed was not cosmetic but was required because the child's dental condition constituted a hazard to future dental health." Mrs. Millard testified that Laurene could not bite anything hard, that her gums bled when she ate and when she brushed her teeth, and that she was in pain. The issue posed by the district court holding is whether orthodontic treatment for conditions such as Laurene Jerico's is required for Medicaid eligible children by Chapter XIX and the HEW regulations.

Any state which participates in the Medicaid program must provide to the categorically needy a number of specified health services. 42 U.S.C. §1396d(a). Among the mandatory programs is EPSDT. A state must provide:

> . . . such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, or other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary. . . .

42 U.S.C. §1396d(a)(4)(B).

The Secretary's implementing regulations define EPSDT care treatment and other required corrective or ameliorative measures as follows:

> (a) the medicaid agency must make available, to recipients under age 21, early and periodic screening and diagnosis to determine physical and mental defects and treatment of conditions discovered within the limits in the plan on amount, duration, and scope.

(b) Subject to utilization controls it may impose, the agency must also make available, if they are not otherwise included in the plan—

(1) Treatment of visual and hearing defects, including provision of eyeglasses and hearing aids; and

(2) Dental services needed for relief of pain and infection, restoration of teeth, and maintenance of dental health.

42 C.F.R. §441.52 (1976) (emphasis added). It seems plain to us that the italicized language includes orthodontic dental care of the kind required by patients such as Laurene Jerico.

Our reading of the regulation is consistent with HEW's Medical Assistance Manual, MSA-PRG-21 (6/28/72); 2 Medicare and Medicaid (CCH) ¶14551.17 (Nov. 9, 1971), which states that:

> "[a]s a minimum, the dental services that must be provided include . . . services for dental disease which, if left untreated, may become acute dental problems or may cause irreversible damage to the teeth or supporting structures."

Where orthodontic services are required to prevent "acute dental problems" or "irreversible damage" we think that they fall within the scope of the directive.

The Manual includes a non-inclusive list of dental services quoted in the margin.[4] Neither in any regulation

[4] a. *Emergency Services*: Emergency dental care services are those necessary to control bleeding, relieve pain, eliminate acute infection; operative procedures which are required to prevent pulpal death and the imminent loss of teeth; treatment of injuries to the teeth of supporting structure (e.g. bone or soft tissues contiguous to the teeth); and palliative therapy for periocoronitis associated with impacted teeth. Routine restorative procedures and root canal therapy are not considered emergency procedures.

b. *Preventive Services*: Preventive dental services include:

1. Instruction in self-care oral hygiene procedures (provided individually or in groups).

2. Oral prophylaxis (cleaning of teeth) necessary as a precursor to the application of dental caries preventives in areas where such applications are indicated (provided in groups or individually), or oral prophylaxis independent of the application of caries preventives for patients 10 years of age or older.

c. *Therapeutic Services*: Therapeutic Services include:

1. Pulp therapy for permanent and primary teeth.

2. Restoration of carious (decayed) permanent and primary teeth with silver amalgam, silicate cement, plastic materials and stainless steel crowns.

3. Scaling and curettage.

4. Maintenance of space for posterior primary teeth lost prematurely.

5. Provision of removable prosthesis when masticatory function is impaired, or when existing prosthesis is unserviceable, or in instances when esthetic considerations interfere with employment or social development.

nor in the Manual is there any suggestion that orthodontia is excluded. It is true that orthodontia is not specifically mentioned in the five therapeutic services listed in the Manual. But neither is extraction of teeth, a procedure which the Commonwealth concedes is frequently essential to treatment.

In the only case which has been called to our attention dealing with the availability of orthodontia to EPSDT recipients, the Supreme Judicial Court of Maine rejected

the same contention which the Commonwealth makes here. *Brooks v. Smith,* 356 A.2d 723 (Me. 1976). Justice Weatherbee held, and we agree, that the federal regulation and treatment manual cannot fairly be read as requiring the complete removal of a child's teeth and the substitution of a removable prosthesis if the child has a dental condition correctable by less drastic orthodontic procedures.

Against the foregoing reading of the statute, regulations and manual the defendants offer the testimony of Mr. Chapin Wilson, a HEW employee charged with the responsibility of implementing the EPSDT program nationwide. He testified that federal regulations do not require the provision of orthodontic services. He did not, however, advance any persuasive reason for this legal opinion, and the authoritative voice of the agency is the text of the regulation. We read it, as does the Supreme Court of Maine, as mandating the provision of all dental services, including orthodontia, "needed for relief of pain and infection, restoration of teeth, and maintenance of dental health."

Thus the order of October 3, 1978 denying injunctive relief against the denial of orthodontic services under the Pennsylvania EPSDT program must be reversed.

VI

Conclusion

The Order of July 18, 1978 appealed from in No. 78-2221 will be affirmed. The Order of October 3, 1978 appealed from in No. 78-2353 will be reversed and the case remanded for the entry of an appropriate supplementary injunction requiring the Commonwealth to provide to eligible EPSDT recipients those orthodontic services which we have held to be required by HEW's implementing regulations.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit